

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellants,

against

JAMES H. INGERSOLL,
IMPLEADED WITH WILLIAM M. TWEED, ELBERT A. WOOD-
WARD AND ANDREW J. GARVEY,
Respondent.

*On Appeal from Judgment sustaining
Demurrer.*

Additional Points for Respondent,
ON RE-ARGUMENT.

WILLIAM FULLERTON,
ELIHU ROOT,
Of Counsel.

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1874.

*Fullerton Court
in reply to Tilden's opinion
January 1874*

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ADDITIONAL POINTS FOR DEFENDANT, UPON THE ARGUMENT OF THE PLAIN- TIF'S APPEAL FROM THE JUDGMENT SUS- TAINING THE DEMURRER TO THE COM- PLAINT.

It is the object of this argument to meet certain objec-
tions which are made by the Attorney-General to an
affirmative answer to the questions proposed by the
Court, and certain suggestions which the Attorney-Gen-
eral makes by way of avoidance of such questions.

These objections and suggestions are :

First.—That the money, which is the subject of this
controversy, never was lawfully in the Treasury of the
County of New York.

Second.—That the County of New York had not the
power of disposition of this money.

Third.—That only an “undefined, unknown and un-
ascertainable class of individuals,” who will be the tax-
payers of New York at some distant future time, are the

parties injured by the acts complained of, and that they are represented only by the State.

Fourth.—That there is an independent right in the Attorney-General to bring this action, whether the County bring it or not.

FIRST.

It is said by the Attorney-General that the money in question was illegally and improperly paid into the treasury of the County by the Comptroller.

To this we answer:

I.—The complaint alleges, "*That the money in question was in formal compliance with the statutes and usual modes of official proceeding in said city, deposited in the National Broadway Bank, in the City of New York, to the credit of an account therein kept by the Chamberlain of the City of New York, as County Treasurer of the said County, by virtue of his said official character as such Chamberlain.*"

This being an allegation of a fact in the complaint, it must be taken as true on the argument of this demurrer.

II.—The law *required* the money in question to be paid into the treasury of the County as it was paid.

The following statutes contain the provisions of law under which this money was paid into the County Treasury, and under which it was to be paid out by the Comptroller, as directed by the law of 1870.

I. Chapter 37 of the laws of 1862, section 2, pro-

vides : "That moneys borrowed upon the re
 "venue bonds of the County of New York shall
 "be deposited by the parties lending the same
 "in the County Treasury."

II. Chapter 623 of the laws of 1865, section I,
 provides : "That all revenue of the City and
 "County, of every kind, shall be deposited in
 "certain banks in the City of New York to be
 "designated by the Chamberlain."

III. Chapter 137 of the laws of 1870, article 5,
 section 37, provides (under the head of "Finance
 Department") : "For a bureau, the chief officer
 "of which shall be called the Chamberlain, for
 "the reception of all moneys paid into the
 "treasury of the city, and for the payment of
 "money on warrants drawn by the Comptroller,
 "and countersigned by the Mayor."

IV. Chapter 590 of the laws of 1857, section 6,
 provides : "That the Finance Department, the
 "Mayor, Aldermen and Commonalty of the
 "City of New York, and its officers, shall have
 "the like powers and perform the like duties in
 "regard to the fiscal concerns of the Board of
 "Supervisors, as they possess in regard to the
 "fiscal concerns of the Mayor, Aldermen and
 "Commonalty, and that *no moneys shall be*
"drawn from the Treasury of the County, ex-
"cept on a warrant drawn by the Comptroller,
"and countersigned by the Clerk of the Board
"of Supervisors."

V. The Revised Statutes, vol. 1, page 370, 1 Ed.,
 sec. 29, provides : "That the Chamberlain of the
 "City and County of New York shall be con-
 "sidered the County Treasurer thereof."

Section 22 of the same article provides :
 "That it shall be the duty of the County
 "Treasurer to receive all moneys belonging to
 "the County, from whatever sources they may
 "be derived."

It follows, from the statute above cited, that it was the duty of the Chamberlain, as County Treasurer, to receive the money in question in his official capacity, and that the only manner in which this money could be paid out of the Treasury was by the Comptroller, as directed in section 4 of chapter 382 of the laws of 1870; and, also, that the only way in which the Comptroller could pay the amounts found to be due, as he was directed to do by this section of the Act of 1870, was by a warrant drawn on the County Treasurer. The Comptroller had no power to fulfil the injunction of the statute of 1870, cited by the Attorney-General as showing that he had the money in question, in any other manner than by drawing a warrant upon the County Treasurer.

The County Treasurer, therefore, must have had the money, and not the Comptroller.

SECOND.

It is said that the County had no power to use the money in question when it had it, and would have none if it recovered it again.

The first section of this very chapter 382 of the laws of 1870 provides: "That from the amounts which the Board of Supervisors are authorized to raise by taxation, *shall be deducted the aggregate amount of the estimated revenues of the County, for the year 1870, not otherwise specifically appropriated by law.*"

So that it appears by this section, that there were to be in the treasury of the County for the payment of the amounts authorized to be paid by the Act, two classes of moneys.

First: Those received from the revenues of the County.

Second : Those raised by taxation.

The moneys so received from the regular revenues of the County were applicable to the payment, and were intended to be applied to the payment of any of the debts authorized to be paid, without any distinction between the different moneys in the treasury arising from different sources.

This is conclusive in favor of the position of the defendants that the county can pay any debts which it is authorized to pay out of any moneys which it has, not otherwise specifically appropriated, and that all moneys paid into the treasury lose their identity and become merged in the common account.

If a valid claim had been audited and certified under this Act of 1870, and presented to the Comptroller for payment he could have paid it, and it would have been his duty to pay it; if there had been funds in the County Treasury derived from any source whatever, not otherwise specifically appropriated, whether the amount had been "*provided for*" by the issue of revenue bonds, or remained to be thereafter "provided for" by the issue of such bonds. The Statute does not say that the moneys to be paid shall be "provided," but it is that the amounts found to be due shall be "*provided for*" by the issue of revenue bonds.

This would be satisfied, as well by the issue of bonds after payment by the Comptroller, out of the unappropriated moneys in the Treasury, as by an issue of bonds before payment.

The funds raised by the issue of revenue bonds to provide for the amounts found to be due, became, whether such amounts had been paid, or were thereafter to be paid, but a part of the general fund in the County Treasury, not distinguished or distinguishable from any other moneys in the treasury, and under the control of the county for all lawful objects.

THIRD.

It is said that "the real and only injury, unless to the State, was to that undefined, unknown and uncertain class of individuals, who, at some unknown period, were to be assessed under the tax laws for the payment of these bonds;" and that "when the wrong was perpetrated, and this action commenced, they may have been all foreigners or unborn," and therefore it is urged that the Supervisors of the county of New York have no right to recover the money in question.

The untenable character of this argument will readily be perceived, when we consider the constitution of the body of citizens inhabiting the county, or who are liable to pay the taxes assessed upon those living within its limits.

It seldom or ever occurs, in the very nature of things, that all of the tax-payers of a county derive benefit from the taxes which they pay. Every year, month and week witnesses a change in the body of tax-payers. People move in the county of New York to-day, and become liable to taxation for the payment of debts contracted years gone by, and from which they derive no benefit.

Many who pay taxes to-day will cease to be inhabitants of the county before the money is expended for any purpose from which they can derive any advantage.

The law takes no notice of these constant and necessary changes.

The Board of Supervisors are organized as a body corporate, and represent the county itself. They have the capacity "to sue and be sued;" "to purchase and hold lands for the use of its inhabitants;" "to make such contracts, and to purchase and hold such personal property as may be necessary to the exercise of its corporate or administrative powers;"

“ to make such orders for the disposition, regulation, “ or use of its corporate property as may be deemed “ conducive to the interests of its inhabitants.”

No one would think of questioning the power of the Supervisors of a county, because their acts in effecting any one of these objects would affect the class of persons who might be inhabitants of the county at some future period, and therefore were “ undefined, unknown and unascertainable.”

The powers of the Supervisors, within the limits prescribed by the Statute, are exercised for the benefit of those who may be the inhabitants or tax-payers of the county at any period in the future.

The present debt of the city of New York, irrespective of the bonds in question, is not payable until years to come, and is then to be paid by that “ undefined, unknown and unascertainable” class who, at the maturity of the bonds, may reside within the limits of the county.

From the very nature of things and the constitution of society, the recovery of this money by the Board of Supervisors, and the payment of it to its County Treasurer, must be regarded in law, whether it results so in point of fact or not, for the benefit of those who, in the end, may be taxed to pay the bonds in question.

If this objection should obtain in this and all other cases where it is equally applicable, the practical results would be that the wheels of government would be stopped.

When a person becomes a citizen of the county of New York, *eo instantia*, he is liable, as a tax-payer, to contribute to the payment of existing obligations, from which he has derived no advantage, and also to provide for future expenditures when he may have ceased to be an inhabitant.

FOURTH.

The answers to Mr. Tilden's argument as to the independent and paramount powers of the Attorney-General of England, are as follows :

1. This action differs radically and entirely from those in which the power of the Attorney-General has been exercised. Those were without exception either to enforce the performance of a trust, or to compel the return of trust funds to the custodian from whom they had been diverted. No such relief as is asked here has ever been given by any Court to the Attorney-General of England.

2. The power of the English Crown, through its Attorney-General, over public officers, was based upon the peculiar character of English municipal corporations. On the other hand our corporations are entirely different in their character, and are controlled directly by the State, without the intervention of any Attorney-General, through the agency of local officers, who are themselves, in the exercise of their statutory duties, agents of the State in the same sense, and to the same effect, that the Attorney-General is.

The reason of the power of the Crown to exercise control in actions by its Attorney-General over the administration of trusts by the officers of its municipal corporations is, that those corporations are in England similar in their nature to our private corporations. Their officers are not the creatures or the agents of the Crown. The Crown does not act through them, and, therefore, the only means by which the Crown can protect the citizens affected by their acts, is through bill or information by the Attorney-General. That jurisdiction exists here as to private corporations, for the same reason that it exists in England both as to private and as to municipal corporations. But the reason does not exist here as to the political subdivisions of the State, or the

quasi-corporations created by the State, for the purpose of carrying out its will, or administering trusts for the benefit of the citizens resident in their respective localities.

These political sub-divisions and quasi corporations are the creatures of the State. The acts of their officers are the acts of the State. Actions brought by the officers mentioned in the 92d Section of Chapter 8 of Part 3 of the Revised Statutes above cited, are as truly in the exercise of the power of the State to protect its citizens, or redress injuries to their interests, as actions brought by the Attorney-General of England to enforce the performance of duties by the officers of English municipal corporations. This remedy being substituted by our statute for that which exists in England, there is no reason as well as no authority for assuming the continuance of the English rule.

FIFTH.

The duty of protecting the rights of citizens of particular localities within this State by appeal to the Courts in cases where, if in England, the Attorney-General might interpose, has been provided and specially assigned by statute in this State, in part to designated officers of the localities themselves, and in part to the Attorney-General, each acting by virtue of the statute *quoad hoc*, as the agent of the State. By Title 4, Part 3, Chap. 8, Section 105 of the Revised Statutes (Vol. 2, page 472, 1st Ed.) it is provided that "actions may be brought by the Supervisors of a County, by the loan officers and Commissioners of Loans of a County; by County Superintendents of the Poor; by Supervisors of Towns; by Overseers of the Poor of the several towns; by School Commissioners and Commissioners of Highways of the several towns; by

“Trustees of School Districts, and by Trustees of
 “Gospel and school lots * * * * to enforce
 “any liability or any duty enjoined by law to such
 “officers and the body which they represent
 “* * * * and to recover damages for any in-
 “juries done to the property or rights of such officers
 and the bodies represented by them;” and it is pro-
 vided (1 R. S., page 179, first Ed., sec. 1,) that “it
 “shall be the duty of the Attorney-General to pros-
 “ecute and defend all actions, in the event of which
 “the People of this State shall be interested;” and
 it is provided by the Code (Sec. 111), “every action
 “must be prosecuted in the name of the real party
 “in interest, except as otherwise provided by Section
 “113,” which does not apply in this case. It can-
 not be maintained that the People of the State have
 such an *interest* in the event of the action which
 may be brought by the Board of Supervisors of a
 County as to empower the Attorney-General to bring
 such action in the name of the People, because, if it
 were so, it would be the *duty* of the Attorney-General
 to bring the action under the foregoing provision of
 the Revised Statutes, which the Supervisors are
 directed to bring by the same statute. No such
 action as this has ever been brought by the Attorney-
 General for this State, and nothing can be clearer
 than that no such action was ever contemplated in
 any of the legislation of the State.

No provision has ever been made among the clearly defined powers of the Treasurer of the State, authorizing him to receive the money. No provision has ever been made by which any officer has any authority in law in any manner whatsoever to apply the moneys, if so recovered and paid into the Treasury of the State, to the use or for the benefit of the class of citizens alleged to have been injured by the acts complained of. If such an action as this had been contemplated for the redress of injuries to the citizens or tax payers of counties, the law certainly would have provided means by which the injuries could be redressed in the action.

The sovereign power of the State is not necessarily exerted through the Attorney-General. It may adopt different forms and modes to accomplish its purposes, and when the Legislature determines that certain actions shall be commenced and rights enforced, in the name of officers known to the law in the political divisions of the State, it is as much an exercise of State sovereignty as if the action had been commenced in the name of the People of the State by its Attorney-General, because they are commenced by and under its authority, and according to its mandate.

The power that enables it to designate the names of persons or officers in whom certain actions shall be commenced also enables it to disqualify itself from bringing such actions in the name of the People. Such disqualification, when established by an act of the people through its Legislature, must continue until it is removed, and the power resumed by legislative action.

It matters not in whose name the law requires an action to be commenced on behalf of a municipal corporation, provided the proper object can be effected.

The Legislature creates municipal corporations, and possesses the power to determine how their rights shall be prosecuted and their wrongs redressed, and when it determines that a County shall be represented by a Board of Supervisors, and all actions affecting its property brought in the name of such Supervisors, it not only determines the party plaintiff to any action for that purpose, but also deprives the People of the right to bring it in their own name.

This new and revolutionary doctrine, that there is a concurrent and paramount right in the State to bring actions in behalf of a county, notwithstanding the Act of Legislature providing that such actions

shall be brought by the Board of Supervisors of a county, is heard of for the first time in this State, or in this country, in the prosecution of this action, and is not to be received with favor. The proposition is wholly unsustained by the authority, and entirely at war with the manner in which the law has been heretofore administered in this State. The political divisions of the State, and the officers who govern them, are provided for by statute. The duties which they are to perform, and the manner of prosecuting rights and redressing wrongs, are defined by the same authority: There is no *casus omissus* which makes it necessary for us to seek for extraordinary remedies, or look to the common law of England for precedents. The argument that the sovereign powers of the State is exerted through local municipal officers as well as through its Attorney-General, does not belittle the State or circumscribe its authority.

The argument of Mr. Tilden seems to be predicated of the belief that we are attacking in some way the jurisdiction of the Court to maintain this action.

Such a question has never been raised or even suggested in this case on behalf of the defendant. The distinction between the jurisdiction of the Court and the right of the People to maintain an action in the Court is too apparent.

Mr. Tilden, in reviewing the cases of *Doolittle vs. The Board of Supervisors of Broome County*, *Roosevelt vs. Draper*, and *Wetmore vs. Story*, where the right to maintain an action was denied the individual tax-holder, asserts that the denial of such right of action in the tax-payer is equivalent to an assertion of a right of action in the People by the Attorney-General. He says, that the tax-payer, stripped of a right of action in his own name, on behalf of himself and associates, is relegated to a condition of helplessness which calls for the interposition of the sovereign as *parens patriae*.

This proves nothing so far as this case is concerned. Because a tax-payer has no authority, either by statute or common law, to bring an action to redress a wrong to a whole community, of which he forms but a small part, and where he sustains no injury which is not common to all, falls far short of proving that the Board of Supervisors of a County, who are authorized by statute to maintain an action, cannot redress a wrong against the County. The question here is not whether there is no one to sue because tax-payers cannot, but it is whether the officers of a county shall exercise the power conferred upon them by law.

It will hardly be contended that should the Legislature now pass an act authorizing the tax-payer to maintain the action (which was denied to him in the cases referred to), that still the exercise of such authority would be regarded as concurrent with the People of this State.

4. Mr. Tilden's argument proves too much or nothing. If it be true, then the Attorney-General has a supervisory power over the administration of all local offices in all counties and municipal corporations throughout the State. If the Treasurer of the County of Erie, or Oneida, or Columbia, pays out money in excess of his authority, the Attorney-General may recover it into the Treasury of the State. If he refuses to pay out money in the performance of his duty, the Attorney-General can compel him to do so. Nor is it easy to see why the commission of a wrong is essential, as a condition, under this theory, to the State obtaining the money hitherto supposed to belong to its Counties, or why all moneys in all Counties throughout the State may not upon the same reasoning be gathered into the State Treasury, and managed and disbursed under the parental direction of the Attorney-General.

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